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Some Considerations Which May Lead Lawmakers to Modify a Policy when Adopting it as Law

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by

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1. Introduction

Among the sources of policies that may be proposed for legal adoption are the various academic disciplines outside the law including economics, political science, sociology, psychology, the health sciences, philosophy, and the like. For example, some economists may propose a policy of regulating a given type of price-fixing practice. Or some political scientists may propose a major modification in an existing welfare program. Or sociologists may propose some new government activity in the name of furthering equality. Of course, social scientists may also be called in to advise on a policy proposal of an interest group.

Many such scholars (and lay counterparts) tend to assume that the policy proposal itself should be the exclusive determinant of the content of the law that is adopted[1]. Of course, these scholars will usually concede that a proposed policy may conflict with another policy and, on this ground, have to be modified before being adopted in the law. And they will concede that the policy may have to be put into "better English" before it is adopted. But often little else will be conceded.

But lawmakers – and in this article I refer only to *makers of statutes and regulations* – are frequently advised to take into account still further considerations when incorporating a policy into law[2]. These other considerations may call for the law to be:

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[1] This is true today of at least one out of three policy-oriented articles to be found in the social science literature.

[2] Among the works of economists or lawyer-economists who have taken an interest in some of these other considerations, one may consult, in particular, EHRLICH and POSNER [1974].

- in the form of a rule
- intelligible
- "factually" administrable
- appropriately prospective
- conditioned on a finding of fault if a penal sanction may be imposed
- in conformity with relevant "process values"
- other[3]

It must be admitted that lawmakers sometimes *unjustifiably* modify policy purportedly on the basis of one or more of the foregoing considerations. But such considerations do have a proper place in a legal system. Indeed, sometimes they may *justifiably* lead lawmakers to modify a proposed policy rather drastically.

I believe important values – non-technical values that may be thought of as special to law – lie behind these considerations. As a result, I will hereafter refer to such considerations as "desiderata". Of course, their desirability is neither universal nor absolute. It is not always desirable, for example, to state the law in the form of rules. Moreover, a proposed policy may be so important that it should not be modified in light of a given desideratum.

In this article, I will treat the foregoing desiderata, and will identify most of the values behind them. My topic overlaps with the concerns of the new institutionalist movement in economics. Among other things, participants in this movement are interested in how law and legal institutions can affect economic policy and its legal implementation, and especially in the institutional choices that must be made when adopting an economic policy in the law[4]. My assigned topic also falls within at least three recognized branches of legal theory (jurisprudence). The topic addresses an important aspect of law's fundamental nature, namely, its relatively autonomous relationship to other social phenomena and other disciplines (including the economy and economics)[5]. The topic is also concerned centrally with the interrelations between ends and means in social ordering through law: policy determines the law, but the desiderata to be considered here characteristically shape policy, too, in the course of its legal adoption. Law is not "all means" and "no end". Law has ends (non-technical values of its own)[6]. Finally, my topic deals with important aspects of the limited efficacy of law. For example, law must be communicated to people. Yet language is limited, and so, too, are people.

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[3] I cannot possibly treat all of the considerations here. Even major ones, such as the desirability of providing for an "exceptions process" in the basic guiding law itself must be omitted. See for example, AMAN [1982]. Also, I cannot go into the fruits of judicial experience in policing lawmakers in the name of the various considerations.

[4] See FUROBOTN and RICHTER [1984].

[5] See SUMMERS [1983] pp. 344–48.

[6] A topic that much interested the late Professor Lon L. Fuller. See FULLER [1968] p. 4 and [1969] esp. ch. 2. See SUMMERS [1984]. See also BERMAN [1956] pp. 37–43.

I will now offer several caveats. I cannot in a short essay treat all of the relevant desiderata. Indeed, I can do little more than identify several of the main ones that influence the formulation of *basic guiding law* (law that essentially directs its addressees to behave in given ways). I will not frontally treat the desiderata that influence the *implementation* of such law. Also I will not try to weigh the various desiderata. Nor will I offer detailed analyses of the values behind the desiderata. The appropriateness and force of the desiderata will vary greatly from context to context. For this, and other reasons, it may not be at all possible to specify a rigorous decision procedure for choosing between desiderata and policy at points of conflict[7]. A great deal of further work of a highly detailed kind is called for.

In what follows, I will offer examples to illustrate all of my major points. The examples are based on actual episodes (but are not faithful thereto in every detail). I do not claim that the solutions reached in each of my examples are in all respects justified.

This article was prepared for a conference consisting mainly of economists. It includes little that is novel to professors of law. I do not claim, however, that professors of law (and practicing lawyers) fully understand the desiderata I will treat, or are generally good at making tradeoffs between desiderata and policy when such tradeoffs are appropriate.

2. *The Desideratum of Making Law in the Form of Rules*

Lawmakers with power to make statutes and regulations frequently have a wide range of choice. They may adopt:

- law in the form of orders
- law in the form of rules (with or without exceptions or an exceptions process)
- law in the form of a very general principle or set of principles
- law in the form of broad grants of discretion with guidelines
- law in the form of broad grants of discretion without any guidelines
- other (including "hybrids" of the above).

Each of the various forms of law has distinctive utilities. For example, it is sometimes best to state law in the form of broad principle. It is also sometimes best to state law in the form of a grant of discretion, with guidelines. Thus it is not always wise (or possible) to state the law in the form of rules. Among other things, the lawmakers may lack the required knowledge or foresight. (The limits of rules is another aspect of the limited efficacy of law that cries out for further work.) But other things being roughly equal, law-

[7] For an effort, in regard to several desiderata, in various contexts, see DIVER [1983]. See also DIVER [1981].

makers should make law in the form of rules[8]. What values lie behind this desideratum[9]?

To make law in the form of a rule is commonly if not typically to make law providing that a class of persons in a category of circumstances be dealt with in the same way. The requirements of generality in rulemaking exert pressure on the lawmaker to cast the law into terms that treat like cases alike and different cases differently. Thus careful rulemakers will be led to consider a range of actual and hypothetical cases to which alternative formulations of the rule might be applied, and to consider whether non-arbitrary distinctions can be drawn between cases that would be treated differently under the formulations. I, of course, do not claim that genuine rules are necessarily non-arbitrary. Indeed, it is not always possible (let alone desirable) to eliminate all arbitrariness. I do claim that a lawmaking process concerned to make rules tends to yield substantive law that embodies fewer arbitrary distinctions, at least as compared to a process concerned to enact broad principles or grants of discretion, forms of law which themselves allow administrators vast scope for arbitrary action. Non-arbitrariness is so highly regarded in some systems that forms of law unduly infringing upon this value are simply unconstitutional (as in our system)[10].

Not only do rules usually purport to treat like cases alike and different cases differently; they purport to do this consistently over time. This imparts continuity to the law and thus helps enable the law's addressees to plan their lives accordingly.

The element of generality in rules has a further importance. Private citizens and others adversely affected by a rule can sometimes be more readily induced to comply voluntarily than they would otherwise, for they can be led to see that they are not being victimized as individuals but are instead being treated the same as other members of a class similarly situated under a rule.

Moreover, resort to rules can serve democratic values in special ways. Most rules have a relatively more restricted and categorical mandatory force than have other forms of law (except orders). As a result, rules constrain exercises of state power more effectively than broad principles, grants of discretion, and the like. Through rules, officials can be more readily held accountable for carrying out the democratic will. When officials must act by rule, and can be publicly seen to do so, this enhances confidence in government as well.

Rules, more than general principles and grants of discretion, dispense with some factors that would otherwise be relevant in the category of circumstances

[8] For general discussion of the desideratum of having law take the form of well-defined general rules, see for example, POUND [1913]; PATTERSON [1953] ch. 5; FULLER [1969], pp. 46–49; SUMMERS [1982] pp. 280–283.

[9] Several of the values are often subsumed under the rubric "the rule of law". See POUND [1934]; BEINART [1962]; FULLER [1969]; RAWLS [1971], pp. 235–43.

[10] For discussion of aspects of this use of the equal protection clause of the U.S. Constitution, see GUNTHER [1972]. On the discipline that derives from a concern to make law in the form of rules, see also GREENAWALT [1978].

involved. Rules also commonly set "priority relations" between any remaining factors insofar as they conflict. As a result, law in the form of rules is, more than all other forms of law (except orders), susceptible of voluntary self application without further guidance from officials.

Rules are also efficient. They may be used to dispose of whole groups of cases all at once. They may be used to encapsulate the wisdom of social experience. They are often readily teachable. And more.

The desideratum of law in the form of rules is a significant co-determinant of the content of many statutes and regulations. A policy will usually be proposed in a form that includes various concepts, distinctions, provisos and other ingredients. If these are not, in turn, appropriately formulable in a rule or a set of rules, the lawmakers may be persuaded not to adopt the proposed policy at all, or only to adopt so such of it as can be formulated in a rule.

Example One. Assume that an interest group proposes to a legislature that a very general principle be adopted to the effect that "employees of the same employer generally be paid equal wages and salaries for comparable work". According to the proposal, a monetary remedy is also to be made available to an employee who can show before an administrative agency that he or she receives less pay than another employee doing comparable work. The legislative committee concerned with the proposal hears a report from its legal counsel and draftsman and thereafter has a lengthy discussion over the meaning of "comparable work". The committee decides that "comparable work" would undoubtedly mean many different things to different people, and therefore would allow administrators too much scope for arbitrary classification of cases. Accordingly, the legislature decides not to adopt the very general principle as initially presented but instead to adopt a much narrower rule, one that provides a monetary remedy to an employee who can show that "for reasons of sex, religion, or race, he or she receives less pay than another employee of comparable qualifications and experience doing the same job"[11]. (Even this proposal would encounter substantial opposition in a legislature concerned to enact only narrow rules.)

It should be apparent from the discussion so far and from the preceding example that the desideratum of having law in the form of rules is not to be equated as such with the policy being proposed for adoption in the law. A proposed policy in the form of a very general principle (or in some other form) could be sound in general, yet not be appropriately translatable into a rule that incorporates the whole of the policy. And the lawmaking body might therefore choose not to adopt the principle at all in the law or, as

[11] This example is based on the general form that some American legislation has taken in this area. See, e.g., the "Equal Pay Act", 29 United States Code sec. 206(d)(1). As in all the examples I set forth in this paper, however, I have made no effort to formulate this example so to reflect the actual course of past history in all details.

in the above example, might adopt a narrower rule that only partially incorporates the policy. Such choices might be justified in light of the values in favor of having law in the form of rules.

Nor does satisfying the desideratum of having law in the form of rules necessarily translate into a greater probability of *policy* effectiveness than would be the case if the law were in the form of principles or grants of discretion. Stating the policy in the form of a very broad principle, for example, might have very great symbolic value for its addressees, value that would translate into greater effectiveness overall. This might even be true in the above illustrative context.

3. The Desideratum of Intelligibility

A given form of law, whether it be an order, a rule, a general principle, or a grant of discretion (with or without guidelines) may be relatively intelligible or relatively less so. Intelligibility is an important desideratum of law in all its forms. It is not necessarily the same as "instant intelligibility" to the law's lay addressees. Nor are its requirements necessarily identical for the purpose of behavioral guidance and of dispute settlement. But I cannot go into these matters here.

One can identify a variety of dimensions within which a form of law may be relatively intelligible or less intelligible, and lawmakers must often make important choices within these dimensions. A form of law may be relatively explicit about its rationale (more intelligible) rather than silent in this regard (less intelligible), relatively familiar (well understood) in terms of the normative principles or policies on which it draws (more intelligible) rather than normatively novel (less intelligible), relatively concrete in its level of generality (more intelligible) rather than quite abstract (less intelligible), relatively precise in its terminology (more intelligible) rather than ambiguous or vague (less intelligible), relatively free of complexity (more intelligible) rather than unmanageabily complex (less clear) and so on. Most of these dimensions overlap to some extent. They may also conflict. And each forms a continuum. (Countless examples might be cited to illustrate points along these continua.) Thus, law in its most intelligible form would be explicit about its rationale, familiar in normative content, expressed at a concrete level of generality, embodied in precise or otherwise well-defined terms, relatively free of complexity, and deal with a subject matter that is itself inherently susceptible of clear treatment. (As Aristotle once put it, "when the thing is indefinite, the rule also is indefinite".)[12] Many laws fall short of this polar cluster, some justifiably so. How much intelligibility is appropriate depends at least on how much is possible, on the values behind the desideratum of intelligiblity in play, on the value

[12] See ARISTOTLE, V10. 1137b.

of the policy to be altered in the name of intelligibility, on the institutional framework involved, and more.

Other things being equal, the more intelligible the law (in the above respects), the better. Except for orders, rules are the form of law most susceptible of intelligible formulation. It is therefore not surprising that lawmakers are commonly advised to adopt law in the form of intelligible rules. Indeed, the two desiderata of rule and intelligibility often come together today in the expression "bright-line rule".

Of course, "other things" are not always "equal". Sometimes it is best not to have the law stated in the form of bright-line rules. The lines involved may deal with important daily affairs yet turn out to be very detailed and complex. As a result, they may only be "bright" to a very small cadre of highly specialized lawyers. The common person (advised by the ordinary lawyer) will thus suffer a double disadvantage. In the conduct of his daily affairs he will be ignorant of where the line is and thus have to incur risks of noncompliance that may prove costly. At the same time, he will be denied the benefits available to those who, on the advice of the very expert, can conduct their affairs at the very edge of the line. Many tax laws are illustrative. It might therefore be a better formulation to say that all the law dealing with the ordinary affairs of life should at least be intelligible to the average lawyer for it is to this lawyer that the common person will turn[13].

The values to be served by intelligibility are numerous. Intelligibility of law, especially in the form of rules, brings certainty, predictability, and planability to life under law. When people can determine with firmness what their legal position is or would be under the law, they can exercise more effective and responsible control over their lives than otherwise.

Intelligibility can also serve as an important safeguard against the abuse of power by officials. I will cite only one example. Criminal prohibitions stated in the form of intelligible rules sharply delimit the capacity of police and prosecutors to abuse their roles by charging people with what are in effect new crimes. Courts, if they are doing their job, will dismiss such prosecutions immediately.

Intelligibility of the law facilitates private dispute settlement out of court. Indeed, if the facts are known, the parties should be able to determine their rights entirely without the aid of courts. (Of course, they may need lawyers to help them in this.) Intelligibility facilitates objective and impartial interpretation and administration of the law by non-judicial officials. It also facilitates adjudication and appellate review, thereby securing a "fair day in court" for litigants.

Intelligibility facilitates critical evaluation of the law. A form of law cast in intelligible terms is a good target.

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[13] See generally CARY [1960].

Intelligibility (along with certain other desiderata) is also a factor that bears on the very legitimacy of exercises of the power to make law.

The desideratum of intelligibility, with its attendant values, is a significant co-determinant of the content of statutes and regulations. Very frequently polices are proposed for adoption that undergo significant modifications in the name of intelligibility.

Example Two. Assume that the legislature wants to adopt and implement a policy of prohibiting private railroads (or other carriers) from engaging in unjustified rate discrimination. The legislature first considers whether to adopt a law in the form of a general principle that prohibits "unjustified rate discrimination". In the end, the legislature instead chooses to adopt a narrow, concrete, precise and simple anti-discrimination rule categorically prohibiting railroads from charging greater rates for short hauls than for longer hauls over the same line. Yet let us assume that this same legislature was fully aware that such a rule might in a few cases *overinclude* – might prohibit higher short haul charges that could actually be justified because, for example, certain shorter hauls might actually involve higher costs. Now, why would the legislature deliberately adopt a rule that might actually over-include and thereby go beyond the policy involved? Part of the answer is that a more intelligible rule – a "bright line rule" – would better serve efficiency of administration, predictability, provision of fair advance opportunity for compliance, and so on. In short, the legislature prefers a more intelligible rule that admittedly overincludes yet brings a desired mixture of policy and values associated with intelligibility. It should also be noted that this same rule might at the same time *underinclude* as well, for it might fail to reach certain forms of unjustified discrimination[14].

Intelligibility cannot be equated with the soundness of the policy involved as such. A policy may be highly intelligible yet quite unsound, or a policy may be somewhat unintelligible (e.g., vague) yet be sound in general.

Nor does increased intelligibility necessarily translate into a higher probability of total policy effectiveness. As noted at the end of the foregoing example, a policy may be altered in the name of intelligibility so that it underincludes, thereby reducing its effective scope overall. And the more intelligible a law is, the easier it may be for some to find ways to circumvent it.

4. The Desideratum of Sufficient "Factual" Administrability

Any policy embodied in law necessarily requires that some facts be determined before that law can be applied. Yet the required facts sometimes cannot be

[14] This example is based on early American regulatory activity under the Interstate Commerce Act. See generally, FRIENDLY [1962], ch. 2.

found very reliably or very efficiently (or both). The desideratum of sufficient factual administrability serves a number of the values also served by intelligibility. For example, factual administrability facilitates responsible private planning, objective interpretation and administration, dispute settlement out of court, adjudication in the first instance, and appellate review.

Lawmakers sometimes face concepts, distinctions, or provisos of a proposed policy which require fact finding that would be unreliable or inefficient. Accordingly, these lawmakers may decide to revise (or even to abandon) the proposed policy. Consider this example:

Example Three. Assume that the lawmakers wish to adopt a law regulating the *processes* by which two corporations may merge with each other. One proposed policy is that if corporate officers state deliberate falsehoods to their own shareholders to convince them of the advantages of a given merger, and the merger thereafter takes place, then the aggrieved shareholders may cancel the merger, provided that the falsehoods were a material cause of the shareholder vote in favor of the merger. After deliberating on this proposal, assume that the lawmaking body becomes convinced that it would not be possible for those who administer the law to determine reliably and efficiently whether shareholders voting for a merger would have voted differently if the corporate officers had not made false statements. First, any such counterfactual inquiry would necessarily be speculative. Second, it would be very costly to conduct such an inquiry through direct and cross-examination of numerous shareholders. Third, even if these shareholders were called to testify, they would be highly motivated to give testimony in accord with the outcome of the litigation which they prefer (after the fact). Accordingly, the lawmaking body adopts a "fall back" solution in which it chooses not to require proof of a causal relation between the false statements and the subsequent decision to merge. Instead, the legislature provides that a merger adopted after such false statements have been made can be cancelled by aggrieved shareholders only when the merger can be shown to have been adopted on terms that were substantively unfair to shareholders in light of the true facts[15].

We can readily see in the foregoing example how the desideratum of sufficient factual administrability can be a co-determinant of the law that is distinct from the underlying policy – here, the policy of granting some remedy to shareholders when corporate officiers tell lies to their shareholders and the shareholders thereafter vote to merge. A policy may be sound in the abstract but not factually administrable. Of course, the desideratum of factual administrability is not wholly independent of the probable effectiveness of any such policy. A policy cannot be as effective as possible if in some contexts facts cannot be reliably found to implement the policy. But the desideratum cannot be equated with mere policy effectiveness either. In some types of situations,

[15] Compare Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

it might be that the facts could be reliably found, but only after factual inquiries that would cost too much. Effectiveness has two facets: efficiency of fact finding, as well as its reliability[16].

5. The Desideratum of Prospective Applicability

In general, law should be prospective rather than retrospective in its applicability. Yet *any* policy newly embodied in a law which imposes a burden on the past activity of citizens or on their ongoing activity is necessarily retrospective in that respect[17]. Such a law is, of course, also prospective too, because it applies to those citizens who engage in new activity under the law for the first time. But my focus will be on the retrospective operation of new laws. The retrospective operation of new laws sometimes unfairly imposes burdens on citizens who have already, and reasonably, made choices and plans in light of the existing law, and who have acted reasonably on the assumption that this law would not be changed in a burdensome fashion. It might even be thought that a rational and just legal system would simply prohibit the retroactive effect of any new law that operates to upset otherwise justified reliance. Actually, in the American system we have categorically prohibited retroactive criminal laws[18]. But in the case of regulatory and other kinds of "civil" laws, we have not taken this drastic course of action, and for very good reason. New laws which impose some new burdens on past or ongoing activity are, in the nature of things, very common. If citizens had the general right to excuse themselves from the impact of *all* new legal burdens on past or ongoing activity, this would drastically limit the innovative powers of modern lawmaking bodies. Thus a frequent choice before such a body is whether to modify the content of a policy proposed for legal adoption in order to limit its retroactive effect in some way. Consider these examples.

Example Four. Assume that a lawmaking body wanted to pass a regulatory law that would require areas within towns and cities in which people have private homes to be segregated ("zoned") solely for use as areas for private homes, with the other areas to be zoned for business and other uses. The law is eventually passed, but not without making some exceptions, including an exception for the offices of doctors that had been established in residential neighborhoods for five years or longer. Such an exception, of course, limits the retrospective effect of the law[19].

Example Five. Assume that a lawmaking body wanted to pass a regulatory law providing that no person who had been convicted of a serious crime

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[16] It is often noted that certain "per-se" rules may be justified in part on the ground of efficiency. See, e.g., SULLIVAN [1977], p. 193.

[17] See generally FULLER [1969].

[18] U.S. Constitution, Article I, sec. 10.

[19] Exceptions to zoning laws are very common in the American system.

could practice medicine. The law is eventually passed but not without an exception for all doctors who had already secured a license to practice before enactment of the law. Observe that this exception does not make the law solely prospective. It would still impose a burden on some past and ongoing activity, including that of students currently attending medical school who would, in effect, be required to stop[20].

Now, it should again be evident from the examples that the desideratum of prospectivity can be a co-determinant of the ultimate content of the law, one independent of the soundness or probable effectiveness of the policy reflected in the law. In the above examples, the soundness of the residential zoning policy and the soundness of the policy of preventing persons convicted of serious crimes from entering the medical profession may be determined independently of the degree of retrospective effect of the new laws involved. Moreover, the desideratum of prospectivity actually operates to cut down the effectiveness of these policies. That is, the exceptions which limit the retrospective effect of the laws also reduce their scope and thus to that extent reduce the very effectiveness of the policies involved. Yet those exceptions are themselves justified in substantial measure by the concern to protect justified reliance on prior law, a basic demand of fairness. The lawmaking body thus chooses to give up some policy effectiveness in exchange for this form of fairness[21].

6. The Desideratum of Requiring Fault Before Any Penal Sanctions are Imposed

This desideratum generally reduces to the notion that a person should not be *penally* sanctioned for violating a law if he acts with an innocent intention and with due care. Such a person is simply not "at fault". Many forms of regulatory and other law are implemented partly through essentially penal sanctions. Lawmakers are often advised to condition the imposition of such sanctions on findings of fault. Such conditions are frequently written into the very terms of the basic guiding law involved.

The desideratum of "no penal liability without fault" may be justified by reference to a range of values. Only two will be cited here. It precludes punishment of the innocent, and is therefore a requirement of justice. It is also unfair to brand an innocent person with the moral opprobrium associated with violating a penal law[22].

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[20] Compare the situation in Hawker v. New York, 170 U.S. 189 (1898).

[21] On the values behind the general desideratum of prospectivity, see FULLER [1969]; MUNZER [1977].

[22] The classic essay in the American literature on the problem involved here is Henry Hart, The Aims of the Criminal Law, 23 Law and Contemporary Problems 401 (1958).

The desideratum of "no penal liability without fault" thus may operate as a co-determinant of the ultimate content of a law, one that is independent of the soundness or probable effectiveness of the policy reflected in the law.

Example Six. Assume that a legislature chooses to legislate a specific policy favoring road safety. A statute is providing that "any person who *knowingly* transports explosives through the main streets or principal roadways (including tunnels) of towns or cities shall be guilty of a class A misdemeanor and subject to imprisonment not exceeding 30 days or a fine of not less than $ 1000 nor more than $ 5000". E, a truck driver for Ace Corp., drives a truck loaded partly with explosives into a tunnel in New York City and the explosives ignite and explode, killing 2 persons and causing much damage. Ace Corp. does not usually transport explosives, E did not load the truck, and E was told by his supervisor that he was hauling only lead pipe. Nevertheless, E is charged with violating the above statute, and the prosecutor is unable to prove that under the special circumstances of the case, E *knowingly* transported the explosives. As a result , E is found not guilty[23].

The requirement of a "knowing" violation to one side, the policy of the statute in the foregoing example is to secure road safety against a general kind of risk. Again, the possible soundness of such a policy is a different thing from the desideratum of "no penal liability without fault", itself a significant co-determinant of the law's content in my example. At least, a policy can, without artificiality, be judged sound or unsound without regard to this desideratum. Nor is a policy more likely to be effective if any penal sanctions it provides for can only be imposed when the defendant is personally at fault. Indeed, it might even be true that such a statute as the above would be a more effective means of securing road safety against the general kind of risk involved if the prosecutor were not required to prove fault. First, under a statute imposing penal liability without fault (that is, with the "knowingly" requirement deleted) persons such as E, above, would be convicted, and the word would get around among truck drivers that they must take extra steps to be doubly sure they are not hauling explosives. Second, as a result of the prosecutor only having to prove that people such as E merely hauled explosives into a prohibited area, relatively more defendants would voluntarily plead guilty, thereby saving prosecutorial time and resources for other more difficult cases[24].

Today lawmakers not uncommonly (though still not so frequently in the U.S.A. as they should) require a finding of fault before imposing penal liability, thereby perhaps diminishing somewhat the effectiveness of the social policy involved. Such lawmakers thus choose to give up policy effectiveness in exchange for justice and other values secured by the principle of "no penal liability without fault".

[23] Compare Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).
[24] See generally, SAYRE [1933].

7. The Desideratum of Providing Due Protection for Any Relevant "Process Value"

The phrase "process value" is used to refer to a standard of value by which we may judge a feature of process to be good *as a process,* apart from any instrumental efficacy this feature might have as a means to good outcomes. Examples of process values are: due participation, legitimacy, fairness, and procedural rationality. Process values are characteristically realized in the course of the workings of a process, rather than in its outcomes. The workings of a process, then, comprise an independently significant realm of value realization. Rules and other forms of law may be specially designed to secure and implement particular process values. For example, rules providing a right to a notice of prospective adverse action and a right to a hearing in which that action may be challenged purport to protect the process value of due participation by affected parties. Of course, such a rule may *also* have the effect of bringing about good outcomes. For example, due participation by the licensee in a proceeding to revoke his license may bring out new facts and thereby *also* contribute to good outcomes. But whether or not this occurs, appropriate participation is, as such prizeable, and thus a process value[25].

Process values play large roles in the design and workings of many modern legal systems. Legislatures, when asked to adopt and implement a new policy not uncommonly also consider how the adoption and implementation of the policy would implicate important process values, and whether special provision should be made in the proposed rules to secure the realization of those values.

Example Seven. Assume that a lawmaking body is asked to formulate rules providing for the licensing of child adoption agencies in order to effectuate a policy against certain unwholesome practices in the adoption field, including the sale of babies at private auction. Before the licensing rules are finally adopted, the lawmaker incorporates into those rules not only a provision that a license will be revoked if the licensee auctions babies, but also a requirement that a licensee receive written notice of possible license revocation and an opportunity for a hearing at which the licensee can present facts and arguments before a license is revoked[26].

The desideratum of providing due protection for any relevant "process value" is to a considerable extent independent of the possible soundness and of the probable effectiveness of the policy involved. A policy can be sound or unsound on its face, apart from whether it is to be implemented through processes that secure process values. And it is familiar that the appropriate realization of process values may actually be inconsistent, in at least some particular cases, with the effective implementation of a policy.

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[25] On the nature of process values, see SUMMERS [1974].

[26] Compare Goldberg v. Kelly, 397 U.S. 254 (1970).

8. Appropriate Regard for Other Desiderata of a More Implementational Kind

Lawmakers, then, must consider how to formulate the content of *basic guiding laws* incorporating policies as modified in light of such desiderata as heretofore discussed. Basic guiding laws essentially direct their addressees to behave in specified ways[27]. Most substantive rules of regulatory law and criminal law are illustrative. Examples One and Two in 2 and 3 above are particularly good examples of basic guiding laws addressed to employers (in 2) and to railroads (in 3), but all the examples in 2 through 7 involve some basic guiding laws. Sections 2 through 7 of this article are therefore addressed *mainly* to the content of basic guiding law.

Once a policy is modified in light of such other desiderata and incorporated into basic guiding law, it does not follow that the resulting law will be self-executing or self-implementing. Lawmakers must consider not only what basic guiding law is required for the adoption of a policy, but often must also devise some *auxilliary implementive machinery* as well[28]. (I do not claim that a sharp line can be drawn between basic guiding law and auxilliary rules and other implementive machinery. One or two of the matters I treated under 2 through 7 could also be treated as at least partly implementive in character.)

The task of devising appropriate auxilliary implementive machinery is often complex. In devising appropriate implementive machinery, the lawmaker may act alone, or in conjunction with the executive, or may delegate some of the task to other bodies. The decisionmakers who create auxilliary implementive machinery may have to make many choices, and many of these choices will, in turn, be reflected in auxilliary implementive rules of various kinds.

To what extent does the incorporation of a policy (as modified by desiderata 2 to 7 above) into basic guiding law itself co-determine not only the content of that law but also further co-determine the implementive choices that decisionmakers make and thus the content and nature of auxilliary law and implementive machinery? Here, the policy is again only partially determinative of content. Indeed, it is generally even less determinative here than it is with regard to the ultimate content of the basic guiding rules. The further question arises, then: what further desiderata of an implementive nature enter here to co-determine the implementive choices decisionmakers make and the content and nature of auxilliary law and other *implementive machinery?* The answer to this question is highly complex, and cannot be treated at all in this article. I can only identify some of the relevant general desiderata:

- the desideratum of deploying the most appropriate general implementive techniques[29]

[27] I do not claim that all important forms of law are essentially concerned with behavioral guidance.

[28] See generally, SUMMERS [1983], pp. 132–152.

[29] See generally, SUMMERS [1971]; CRANSTON [1979]. A study by economists of relevance here is WHITE and WITTMAN [1983].

- the desideratum of taking appropriate account of the distinctive uses and limits of the legal institutions and processes that are to play roles in the implementive techniques to be deployed[30]
- the desideratum of due promulgation and publication of the basic guiding law[31]
- the desideratum of making appropriate provision for remedies, sanctions, and other implementive devices[32]
- the desideratum of appropriately assigning enforcement rights and responsibilities[33]
- the desideratum of due facilitation of private or informal dispute resolution[34]
- the desideratum of due regard for law's overall limited efficacy[35]

Important non-technical values lie behind all of these desiderata, too, and they are not identical with the values behind the desiderata considered in sections 2–7 above.

9. Conclusion

Desiderata such as those identified in 2–7 may justifiably co-determine the content of *basic guiding laws* in important ways. Indeed, some basic guiding laws would have a strikingly different content if influenced solely by the social policies involved. That is, in a given instance, *many* desiderata such as those identified in 2–7 may together come into play to modify the content of a proposed policy. Thus, if we consider only the bearing of four such desiderata: intelligibility, prospectivity, factual administrability, and "no penal liability

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[30] By far the best work on this complex cluster of topics in Anglo-American law was done by the late professor Lon L. Fuller of the Harvard Law School. See FULLER [1981]. For a recent and detailed summary, see SUMMERS [1984], chs. 6–8. With Fuller's work on adjudicative processes, it is important to compare, in particular, CHAYES [1976]. Examples of two important efforts to apply Fullerian theory in widely divergent contexts are: BOTEIN [1972], and HENDERSON [1973].

[31] See generally, FULLER [1969]; BAILEY [1941] and MURPHY [1982].

[32] See generally, READ, MACDONALD, FORDHAM, and PIERCE [1973] ch. 7; FREUND [1932]; HART and SACKS [1958].

[33] There are at least two major questions here. When should private persons as well as officials have enforcement rights? Which private persons should have what enforcement rights? There is a vast body of legal literature on aspects of these questions. For discussion of some of these problems from an economic point of view, see POSNER [1977], ch. 22.

[34] Statutes sometimes include provisions designed to facilitate private dispute settlement. Section 2–607(3) of the Uniform Commercial Code dealing with the sale of goods is a major example.

[35] See generally, POUND [1917]; SUMMERS [1982], ch. 12; ANTON [1979]; SUMMERS and HOWARD [1972], pp. 111–117, 190–195, 270–273, 359–362, 434–435. On the relative indefinability of certain important concepts for legal purposes, see, e.g., NUTTING [1965].

without fault", we can readily see that the first might co-determine the content of the rule so that it *over-includes,* the second so that significant *exceptions* are recognized, the third so that its *entire scope is delimited,* and the fourth so that its operation is *conditioned on a finding of fault.* Such desiderata do not merely take "small bites" out of the policy involved!

Moreover, various other *implementive* desiderata (see 8 above) may justifiably co-determine the content of implementive choices and the content of auxiliary rules and other implementive machinery even more than do the underlying policies involved.

The desiderata (2–7) are all justifiable by reference to important values. An ideal legal system is one in which such desiderata along with various implementive desiderata (such as those in 8) are all appropriately taken into account when making and implementing such policy through law. In short, an ideal legal system is one in which we have an appropriate "mixture" of all these things – a mixture that thus respects law's limits, and respects law's relative autonomy, including the non-technical values characteristic of law-like governance. It may be that social scientists, and especially economists, will be able to bring the systematic methods of their own disciplines to bear to secure a better mixture than we have had in the past.

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